

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

SAMER H.,

Claimant,

And

INLAND REGIONAL CENTER,

Service Agency.

OAH No. 2005090742

CORRECTED DECISION

Gary Brozio, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in San Bernardino, California, on April 5, 2006.

Deborah K. Crudup, Consumer Services Representative, represented the Inland Regional Center.

Jaqueline H. and Alexander H., Claimant's parents, represented Claimant at the hearing. Claimant, Samer H., was not present.

The matter was submitted April 5, 2006.

ISSUES

This dispute involves the amount of funding the Inland Regional Center (IRC) was required to pay the parents for Samer's participation in a LOVASS discrete trial training program from September 27, 2004 through May 31, 2005, and December 1, 2005 until May 31, 2006. The issues are:

1. Was the IRC obligated to fund Claimant with the equivalent of \$2,500 per month for the discrete trial training program?
2. Was the IRC obligated to fund services provided by Claimant's discrete trial training supervisors?

3. Was the IRC obligated to fund more than the \$10 usual and customary rate per hour paid to discrete trial training instructors?

FACTUAL FINDINGS

Claimant's Status

1. Jaqueline and Alexander H. have a young son named Samer. Samer lives with his parents in Yucca Valley. The parents care a great deal for Samer and want to do everything possible to aid his development. The parents' love and devotion to Samer is undisputed.

2. Samer has been diagnosed with autism. Samer's Individual Program Plan (IPP) dated August 17, 2005, explained that Samer requires assistance with most daily living skills. Among other things, he displays hand flapping, rocking, and echolalic behaviors. He wanders away. He gets overwhelmed in public, runs around uncontrollably, and bumps into people. He is aggressive, especially toward his mother, and often throws things when he is angry. The mother spends most of her day with Samer and bears the brunt of his behaviors.

3. Samer's 2005 IPP stated that he has the right to the "most appropriate, least restrictive educational program." The IPP stated that Samer was enrolled in a LOVASS behavior modification program. The IPP stated that the IRC would provide Samer with 40 hours a week of in-home instructor support at the rate of \$10 per hour. The IPP stated that the Morongo Unified School District would fund the remaining portions of the LOVASS program.

4. By all accounts, the LOVASS program greatly helped Samer's development. The parents explained that Samer can now speak, and that he has improved in many other areas. They attribute the success to the discrete trial training. The continuous notes from the 2005 review confirmed this, stating that Samer's "speech has really started to take off this past year, since the LOVASS behavior program has been in place."

Problems Starting the Discrete Trial Training Program

5. The parents had great difficulty getting a discrete trial training program to provide services in Yucca Valley. Yucca Valley has a population of around 16,000. It is in a rural desert about 30 miles from Palm Springs on a two-lane highway. It is about 20 miles from the town of Twentynine Palms.¹ Yucca Valley is in the Morongo Unified School District.

¹ Official notice was taken of the approximate population of Yucca Valley and the town's distance from other cities as these facts were reasonably ascertainable and beyond dispute.

6. The LOVASS program was the only discrete trial training program willing to provide services in Yucca Valley. In addition, the parents had difficulty getting instructors to come to Yucca Valley because of the distance. Instructors driving from the Palm Springs area traveled at least 60 miles round trip. Instructors coming from Twentynine Palms traveled 40 miles round trip. The parents testified that the only way they could attract qualified instructors willing to drive long distances was to offer a higher-than-usual hourly wage.

7. The parents had three instructors over the relevant time periods. Lizeth Garcia was in college studying speech pathology and child development. She traveled from Indio, which required a 120 mile round trip. Moringstar Potts was in college studying marketing but was also taking classes in child development. She traveled from Twentynine Palms. Sandy Ouimette was in college studying psychology. She lived in Yucca Valley. The parents paid these instructors \$20 hour.

Problems Funding the Discrete Trial Training Program

8. Sometime in 2004, the IRC learned that the school district was not providing Samer discrete trial training. The district completely refused the service. The IRC believed that the district had a legal obligation to provide it; and consequently, it hired Attorney Steve Hermanson to represent Samer's interests in the dispute with the school district.

9. Hermanson's role was to obtain a certain portion of Samer's discrete trial services from the district. The remaining portion would be paid by the IRC. The percentages were not set because the IRC did not have a memorandum of understanding (MOU) with the district regarding how to proportion costs. The IRC had MOU's with most other school districts, but not Morongo Unified. Under the MOU's with other districts, the IRC split costs evenly if the child was in school full time (which meant there was a decrease in home tutoring). When the child was at home full time, the IRC generally bore 30 percent of the costs.

10. Hermanson sued the district to obtain services for Samer. Hermanson's goal was to obtain funds that would cover the parents' monthly costs for discrete trial training. Hermanson determined that the parents' expenditures for discrete trial training ranged between \$4,000 and \$4,500 per a month. (IRC Program Manager Lavina Johnson said the range was between \$4,200 and \$4,800 per month, and Mr. Haddad testified that his present costs are \$4,850 a month.) This sum covered all costs, including instructors, supervisors, and clinic meetings. It was clear, however, that some portion of the funding would be borne by the IRC. Thus, at the same time Hermanson was negotiating with the district, he had to ensure that the IRC would cover the remaining funding.

11. Hermanson accomplished this through informal discussions with Lavina Johnson. Johnson told Hermanson that the IRC would pay *up to 50 percent of the costs*, but the IRC hoped that the contribution would be closer to 30 or 35 percent. Hermanson confirmed this in his testimony. In other words, the IRC wanted an arrangement that

matched the MOU's with other districts for autistic children not attending school. But if that was impossible, the IRC would go the extra mile and pay up to 50 percent of Samer's discrete trial training even though he was not attending school.

12. Unfortunately, the parents believed that the IRC was *guaranteeing* 50 percent. This was an incorrect assumption. It apparently resulted from miscommunications between the parents and their attorney. The parents conceded that they never heard anyone for the IRC make such a promise, and no such promise exists in writing. There is nothing in Samer's IPP stating that that degree of funding was necessary.

13. The lawsuit against the district was resolved in mediation. In the September 2004 mediation agreement, the district promised to pay the parents \$2,500 a month for the LOVASS program. The document only said that the money was to be used for the LOVASS program. It did not designate specific amounts for specific purposes. Hermanson secured a set monthly rate because, in his experience, this eliminated potential funding problems in the future. The parents then mistakenly surmised that the IRC was also going to pay them \$2,500 a month.

14. After the 2004 mediation, Johnson started to determine what contribution the IRC would make to the parents. She asked the school district and LOVASS to confirm what the district's \$2,500 was supposed to cover. Both confirmed that approximately \$1,600 dollars was for 10 hours of supervisory fees per month. This was the entire amount of supervisory costs. The remaining money was designated for one to one discrete training at a rate of \$25 per hour, but Hermanson testified that this was merely a way to procure the set amount of \$2,500 per month from the school district. (In other words, it was not intended to constitute a finding that Samer's tutors were entitled to \$25 per hour.) Again, the goal was to cover the parents' out-of-pocket expenditures for Samer's LOVASS program.

15. The IRC could not reimburse the parents for additional supervisory costs because another government agency was already paying them in full. Consequently, Johnson decided to grant the Parents 40 hours a week of one to one discrete training at the IRC's usual and customary rate of \$10 per hour. This was calculated using the formula of 4.3 weeks per month times 40 hours a week for a total of approximately \$1,720 per month. ($4.3 \times 40 \times 10 = 1,720$.) The IRC could not exceed the \$10 per hour rate because it was prohibited from setting rates higher than the vendor rate. The combination of the district's \$2,500 per month and the IRC's \$1,720 per month resulted in a total funding of approximately \$4,220 per month.

16. The IRC's decision to hire Hermanson to represent Samer's interests, and the IRC's flexibility during the negotiations, were admirable. These actions also evinced an understanding that Samer's autism and his IPP required a level of funding for the LOVASS program somewhere in the range of \$4,000 and \$4,800 per month.

The Dispute Over Funding With the IRC

17. Johnson telephoned the mother around October 20, 2004 and informed her that the IRC planned to provide 40 hours a week of one to one discrete training at the rate of \$10 per hour. The mother did not recall this conversation, and maintained it did not take place until October 2005. However, Johnson had a specific memory of the conversation and wrote contemporaneous notes. Johnson's testimony was more credible. Thus, the parents were on notice in October 2004 that the IRC had not promised to pay \$2,500 per month.

18. There was a second settlement agreement between the parents and the district in November 2005. Hermanson had no further conversations with the IRC during these negotiations. The district has not been making required payments, and Hermanson testified that he was planning to write the school district a demand letter.

19. The parties could not resolve the dispute involving the IRC's funding. This hearing followed.

Evaluation

20. The parents contend that the IRC was obligated to fund \$2,500 a month for discrete trial instructors. There is no evidence to support this argument. To begin with, there is no evidence that the parents – at any time past or present - spent \$5,000 a month on LOVASS services. At the hearing, the father testified that his present costs are \$4,850 a month, which even now does not amount to \$5,000 per month. Further, at the time the deals were being struck in the Fall of 2004, the parents monthly payment for services was somewhere between \$4000 and \$4,800 per month. Finally, the IRC never guaranteed that they would match the district's payment. Johnson merely represented to Hermanson that the IRC would pay *up to 50 percent* of the costs if necessary to fully reimburse the parents. The object was to *compensate* the parents for their actual LOVASS costs, not to *increase* funding. The idea that the IRC was going to pay \$2,500 a month resulted from an unfortunate misunderstanding between the parents and their lawyer. While it is completely understandable that the parents would want extra money to give Samer the best possible services, the combined sum of \$5000 was not agreed upon and was not necessary to implement the IPP.

21. The parents contend that the IRC was obligated to fund half of the supervisory costs for the LOVASS program. This contention misapprehends the nature of the negotiations Hermanson conducted in order to meet Samer's IPP. Again, the goal of the mediation with the district, and the concomitant communications with the IRC, was to find a way to compensate the parents for their actual out-of-pocket expenses for the LOVASS program. The district paid the total supervisory costs necessary under Samer's IPP. No more was required.

22. Finally, the parents contend that they should be afforded a higher hourly rate for discrete-trial-training instructors. They argued for a \$20 per hour rate. There was a great deal of evidence regarding the usual and customary rate for this service. The range of fees is very wide, but the IRC's evidence established that \$10 per hour is the usual and customary rate. There is room, however, for upward departure in unusual and extraordinary cases. For example, Johnson testified that a higher fee might be warranted if reasonably skilled trainers had to travel a great distance to provide assistance in a remote area.

23. It is reasonable to pay skilled instructors a higher hourly rate if they have to travel to Yucca Valley from distances of 30 miles or more (60 miles round trip). The \$10 hour rate is not sufficient to attract qualified instructors who must travel that distance. In other words, the parents would not be able to hire instructors qualified to implement Samer's IPP. But a higher rate is not warranted for instructors coming from Yucca Valley or Twentynine Palms. People routinely drive up to 20 miles (40 miles round trip) for employment.

24. Under the unique facts of this case, it is reasonable to increase the rate to \$13 an hour for qualified instructors traveling 60 miles or more round trip. This would apply to instructors living in Palm Springs and beyond. This rate takes into consideration that the school district's funding provides additional money for instructors. To obtain the \$13 rate, it would be reasonable to require the parents to provide the IRC with (1) a statement that they attempted to get qualified instructors within the 30 radius but were unable to do so, (2) the name, address, telephone number, and qualifications of the instructor living outside the 30 mile radius, and (3) an accurate accounting of the hours worked by that instructor on a monthly basis.

25. The parents' instructors were reasonably skilled and their results were good, but only one of them drove distances that would warrant the higher rate. The parents did not provide documentation permitting a retroactive calculation, and it would be unfair to require them to do so now. More importantly, it is in Samer's best interest to get these funding issues behind the parties, and heal the relationship between the parents and the IRC as soon as possible.

26. Based on the testimony at the hearing, it is reasonable to assume that the average monthly sum necessary for Samer's LOVASS program needs was \$4,400 per a month. (The range was between \$4,000 and \$4,800 per month and \$4,400 was the average.) Since the district paid \$2,500 per month, the IRC's contribution should have been approximately \$1,900 per month. This level of contribution was sufficient to fund Samer's LOVASS program and meet the requirements of Samer's IPP. It was sufficient to meet the IRC's obligations to achieve cost effectiveness. It is reasonable to use this method to settle the issues between the parties.

CONCLUSIONS OF LAW

1. The Lanterman Developmental Disabilities Services Act (Act) is contained in the Welfare and Institutions Code. (Welf. & Inst. Code, § 4500 et. seq.)² The purpose of the Act is to provide a “pattern of facilities and services . . . sufficiently complete to meet the needs of each person with developmental disabilities, regardless of age or degree of handicap, and at each stage of life.” (§ 4501; *Association of Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 388.) Such services include assessing the needs of each developmentally disabled person, and on an individual basis, selecting and providing services to meet those needs. (§§ 4642-4643; 4646-4647; *Association of Retarded Citizens, supra*, 38 Cal.3d at 388.)

2. A developmentally disabled person has the right to treatment at state expense. (*Association of Retarded Citizens, supra*, 38 Cal.3d at 389.) The regional center is charged with providing developmentally disabled persons with “access to the facilities and services best suited to them throughout their lifetime.” (§ 4620; *Association of Retarded Citizens, supra*, 38 Cal.3d at 389.) The developmentally disabled person’s IPP identifies the necessary services and must include, among other things, a statement of time-limited objectives for improving the situation and a schedule of the type and amount of services necessary to achieve the IPP’s objectives. (§ 4646; *Association of Retarded Citizens, supra*, 38 Cal.3d at 390.)

3. When providing services, the IPP must serve competing objectives. On the one hand, the IPP must, where appropriate, ensure that the services to consumers and their families be effective in meeting the IPP’s goals and reflect the preferences and choices of the consumer. On the other hand, the IPP must reflect the cost-effective use of public resources. (§§ 4512, subd. (b); 4646.)

4. The Act sets forth recommended criteria for securing needed services. Section 4648, subdivision (a)(6) provides:

“The regional center and the consumer, or where appropriate, his or her parents, legal guardian, conservator, or authorized representative, including those appointed pursuant to Section 4590 or subdivision (e) of Section 4705, shall, pursuant to the individual program plan, consider all of the following when selecting a provider of consumer services and supports:

(A) A provider's ability to deliver quality services or supports which can accomplish all or part of the consumer's individual program plan.

² All further references are to the Welfare and Institutions Code unless otherwise specified.

(B) A provider's success in achieving the objectives set forth in the individual program plan.

(C) Where appropriate, the existence of licensing, accreditation, or professional certification.

(D) The cost of providing services or supports of comparable quality by different providers, if available.

(E) The consumer's or, where appropriate, the parents, legal guardian, or conservator of a consumer's choice of providers.”

5. The California Code of Regulations sets guidelines for determining the usual and customary rate of services. Section 57210, subdivision (a)(19) of Title 17 of the California Code of Regulations defines the usual and customary rate and provides in relevant part:

“‘Usual and Customary Rate’ means the rate which is regularly charged by a vendor for a service that is used by both regional center consumers and/or their families and where at least 30% of the recipients of the given service are not regional center consumers or their families. If more than one rate is charged for a given, service, the rate determined to be the usual and customary rate for a regional center consumer and/or family shall not exceed whichever rate is regularly charged to members of the general public who are seeking the service for an individual with a developmental disability who is not a regional center consumer, and any difference between the two rates must be for extra services provided and not imposed as a surcharge to cover the cost of measures necessary for the vendor to achieve compliance with the Americans With Disabilities Act.”

6. Section 57300, subdivision (c) of Title 17 of the California Code of Regulations prohibits regional centers from reimbursing vendors “[u]nless they have a rate established pursuant to these regulations which is currently in effect” and “[f]or services in an amount greater than the rate established pursuant to these regulations.”

7. In the Inland Empire, the usual and customary rate paid to vendors for discrete trial training instructors is \$10 per hour.

8. The parents have not met their burden of showing that the IRC was obligated to fund \$2,500 a month for discrete trial instructors.

9. The parents have not met their burden of showing that the IRC was obligated to fund half of the supervisory costs for the LOVASS program.

10. The parents have not met their burden of showing that the IRC was obligated to fund discrete trial trainers at the rate of \$20 per hour. Under the Act, the parents were not

permitted to secure the services of the trainers they wanted, at the rate they wanted to pay, and then force the IRC to pay that rate. It was legally necessary for the IRC to accommodate the parents' preferences, where appropriate, but their preferences had to be weighed against the IRC's obligation to make cost-effective use of public resources. The \$10 hourly rate was sufficient, in combination with the school district's funding, to meet the objectives of Samer's IPP in a cost-effective way for discrete trial trainers living within a 30 mile radius of the parents' home.

11. The parents have met their burden of showing that an increase in the rate to \$13 per hour was warranted for qualified instructors living 30 miles or more from Yucca Valley so long as the parents were unable to secure qualified instructors within that radius. In addition, the parents have met their burden to show that they were entitled to the \$13 rate for one of their instructors over the disputed periods. It is unfair and unreasonable to require them to provide a retroactive accounting. It is fair and reasonable to calculate the IRC's funding for Samer's discrete trial training at the rate of \$1,900 per month. This method of resolving the dispute is in Samer's best interest.

ORDERS

1. For the disputed periods from September 27, 2004 through May 31, 2005, and December 1, 2005 through May 31, 2006, the IRC is ordered to calculate its portion of the funding for Samer's LOVASS program at \$1,900 per month. The IRC is ordered to reimburse Claimant any difference in payments already made, and to calculate all remaining payments for the disputed periods at the rate of \$1,900 per month. The order shall become effective 30 days after the time for review has lapsed.

2. In developing Samer's upcoming IPP, the IRC shall increase the funding for instructors to \$13 per hour for any instructor who must drive over 60 miles round trip. In order to be entitled to this rate, the parents as vendors must provide the IRC with (1) a letter stating that they attempted to get qualified instructors within the limit but were unable to do so, (2) the name, address, telephone number, and qualifications of the instructor living outside the 30-mile limit, and (3) an accurate accounting of the hours worked by that instructor on a monthly basis.

3. All other claims for relief are denied.

NOTICE

This is the final administrative decision; both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.

DATED: _____

GARY BROZIO
Administrative Law Judge
Office of Administrative Hearings